WITNESSES — IMPEACHMENT — ADMISSIBILITY OF SUBSEQUENT INCONSISTENT STATEMENTS OF ABSENT WITNESS. — In the absence of a witness from the jurisdiction his testimony in a former trial of the same cause was admitted. It was then sought to introduce an *ex parte* affidavit made subsequently wherein the witness confessed the falsity of this testimony. *Held*, that the affidavit is inadmissible, since the witness must first be questioned as to the circumstances of making it. *Baker* v. *Sands*, 140 S. W. 520 (Tex., Ct. Civ. App.).

A witness's testimony cannot be impeached by inconsistent statements without first directing his attention to them and the circumstances when they were made. *Queen's Case*, 2 B. & B. 284; *Trumble* v. *Happy*, 114 Ia. 624, 87 N. W. 678. *Contra*, *Tucker* v. *Welsh*, 17 Mass. 160. This is necessary to give the witness opportunity for denial or explanation. But where his death or absence renders the requirement impossible of performance, the impeaching party loses valuable evidence. For this reason, dying declarations may be impeached by contradiction, though a foundation cannot be laid. *Carver* v. *United States*, 164 U. S. 694, 17 Sup. Ct. 228; *State* v. *Lodge*, 9 Houst. (Del.) 542, 33 Atl. 312. *Contra*, *State* v. *Taylor*, 56 S. C. 360, 34 S. E. 939. It is held, however, that to impeach former testimony or depositions, the preliminary question is indispensable, since there has been opportunity to lay the foundation. *Jenkins* v. *Lutz*, 26 Ind. App. 150, 59 N. E. 288; *Ayers* v. *Watson*, 132 U. S. 394, 10 Sup. Ct. 116. But in the principal case the contradictory statement was made after the opportunity for cross-examination. The weight of authority, however, refuses to extend the exception beyond dying declarations. *Craft* v. *Commonwealth*, 81 Ky. 250; *Mattox* v. *United States*, 156 U. S. 237, 15 Sup. Ct. 337. *Contra*, *Downer* v. *Dana*, 19 Vt. 338. The rule produces the curious result that, of contradictory depositions by an unavailable witness, the party introducing a deposition first is immune from attack. The witness should not be sheltered to the miscarriage of justice. The solution lies not in extension of the exception, but in making the requirement of the question discretionary. *Rothrock* v. *Gallaher*, 91 Pa. St. 108. See 13 HARV. L. REV. 306. This the court recognizes, but rests its decision upon the impeacher's opportunity to lay the foundation by deposition.

WITNESSES — PRIVILEGED COMMUNICATIONS — HUSBAND AND WIFE. — In an action for separation for cruelty the wife sought to introduce evidence of statements made to her by the defendant, a physician, as to the necessity of an operation for abortion which she permitted him to perform. *Held*, that the evidence is not privileged as a marital communication. *Sheldon* v. *Sheldon*, 131 N. Y. Supp. 291 (App. Div.).

The reason for the privilege against disclosure of confidential communications is the belief that it is socially desirable to foster certain relations of confidence. See 4 WIGMORE, EVIDENCE, §§ 2285, 2332. This case decides that when two of these relations coincide, the fact that a husband makes a statement to his wife in his capacity as physician puts an end to the privilege based on the marital relation and leaves only the other privilege, due to the physician and patient relation, waivable by the patient. It is submitted that the court thus creates an illogical and impolitic limitation on the protection given to confidences between husband and wife. The actual result, however, is desirable, for the action is between the spouses for a wrong done to the one by the other. In such circumstances the reason for the privilege ceases and it should cease also. See 4 WIGMORE, EVIDENCE, § 2338 (2). Some legislatures have recognized this. See *People* v. *Warner*, 117 Cal. 637, 639, 49 Pac. 841; *Goelz* v. *Goelz*, 157 Ill. 33, 41, 41 N. E. 756, 758. The New York legislature has not, and the court endeavoring to work justice has adopted a rule undesirable in actions not between the couple.